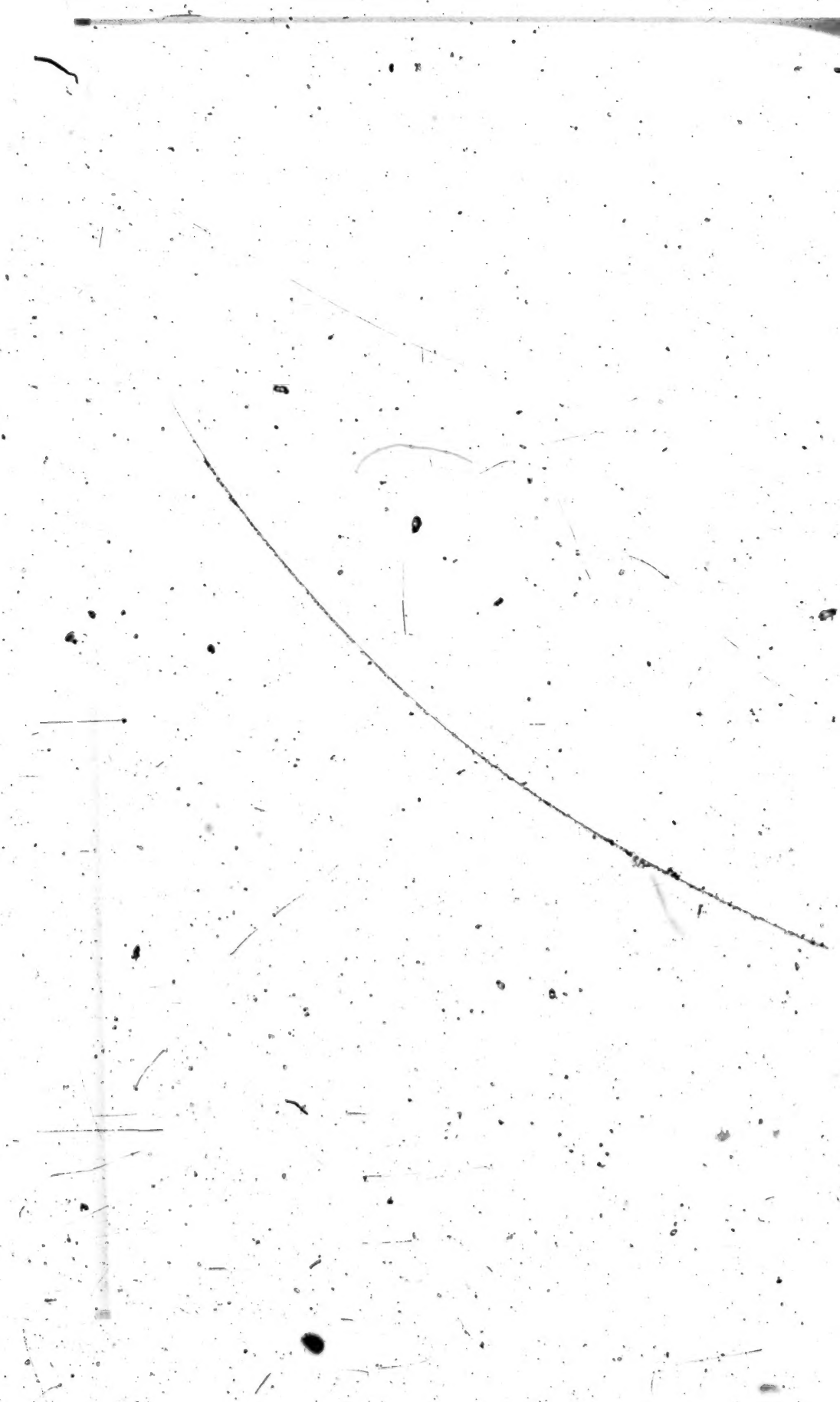

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

REPLY BRIEF FOR PETITIONER

GERALD W. GETTY, Public Defender of Cook County, Illinois,
RICHARD J. HORKA and
WILLIAM H. HALL, and
JAMES J. DOHERTY, Assistant Public Defender

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1. NONDISCLOSURE OF EXONERATING EVIDENCE.

The respondent seeks to excuse the nondisclosure of six items of exonerating evidence for three reasons:

1. Suppression must be by the *prosecution* rather than by the police.
2. Disclosure must be *requested.*
3. The evidence suppressed must be *material.*

We will show that all three of these reasons are invalid under the facts and the law.

Respondent argues that the *Brady* v. *Maryland* doctrine is limited to suppression by the *prosecution*. (Br. 9.)

Of course that is the majority view of the court below. (App. 8a.) The better view is expressed by the dissent of Mr. Justice Schaefer (App. 18a-19a) that nondisclosure by the police is equally as harmful and as much a denial of due process to the accused as nondisclosure by the prosecution. *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842.

Resolution of that difference of opinion in the case at bar is unnecessary because the prosecution knew about at least two of the six items of exonerating evidence:

(1) The prosecutors were present (A. 45-47) when the Lansing Police actively encouraged Virgle Sanders to falsely identify petitioner Moore as the man known as "Slick" although he did *not* look like "Slick." (A. 294-295.)

(2) The prosecutors knew that William Leon Thompson who could identify "Slick" had been shown a photograph of petitioner Moore and had not identified him as "Slick." Lieutenant Turbin told the prosecutors about that event. (A. 266, 267.)

The prosecution knew and yet did not disclose either of those two events to trial counsel. That is a clear showing of *prosecution* failure to disclose favorable evidence to the accused.

Moreover, Lieutenant Robert Turbin of the Lansing Police Department sat at the counsel table with the prose-

cutors throughout the trial. (A. 11, 316-317.) That was the same Lieutenant Turbin who had been assigned to look for James E. "Slick" Watts. (A. 346.) Thus, not only was the Lansing Police and the prosecution legally inseparable (*Barbee* v. *Warden*) but factually inseparable. They were one and the same.

Respondent argues that *Brady* v. *Maryland* requires a *request*. (Br. 9.)

Exonerating evidence not reduced to writing cannot be constitutionally concealed simply because there was no request for it. "If the defense does not know of the existence of the evidence, it may not be able to request its production." *Giles* v. *Maryland*, 386 U.S. 66, 102, concurring opinion. Four of the six items of exonerating evidence in the instant case were not even reduced to writing. (A. 254-255, 266, 294-295, 346.)

In the case at bar there was a more formal request than in *Brady* v. *Maryland*—a written motion for any and all statements made to the Lansing Police. (A. 5.)

Respondent argues that the prosecutor displayed his entire file to the defense. (Br. 9.)

Defense counsel Horka testified at the post-conviction hearing that prosecutor Fleming obstreperously offered his file but that he was not shown the file. (A. 331.) Prosecutor Fleming testified that he showed Horka his entire file. (A. 319.) But he did not recall whether Virgle Sanders' statement was in his file (A. 321) or the diagram showing where Henley Powell was seated. (A. 322-324.)

Assume, however, that Fleming did give Horka the file. Shouldn't Horka be able to rely upon the inarticu-

lated representation that everything material or relevant to the prosecution of the case is contained in that file? Fleming did not remember whether two documents were contained in that file. And obviously, the file did *not* contain the other four items of exonerating evidence which were not even recorded. (A. 254-255, 346, 266, 294-295.) Cf. *Jackson* v. *Wainwright,* 390 F. 2d 288, 298.

> Respondent argues that the undisclosed six items of exonerating evidence was not *material.* (Br. 10-17.)

State concealment of the fact that another man voluntarily confessed to a murder for which the accused has been sentenced to death is material.

Five of the six items of exonerating evidence irresistibly point to the conclusion that James E. "Slick" Watts and not the petitioner Moore bragged to Virgle Sanders that he shot the bartender in Lansing. But neither the identity nor even the existence of James E. "Slick" Watts was disclosed to the defense at the trial. That evidence coupled with the unimpeached work-record alibi evidence might have persuaded the jury of petitioner's innocence.

Respondent now tries to minimize the importance of the undisclosed exonerating evidence:

> Respondent argues that it is unimportant that Virgle Sanders told the Lansing Police that he first met "Slick" about six months before the murder; that the six month period was a "rough guess" and that "it could have been two, three months to nine months. I don't know." (Br. 11-12.)

The record shows that Sanders knew definitely that his first meeting with "Slick" was before Christmas of '61. That is a fact—a pinned-down fact:

Q. You are definite that it was before Christmas of '61 that you saw him in Wanda and Dell's?
A. Oh, yes. (A. 295.)

Respondent misstated an important fact which could be misleading:

> 3. Soon after Virgle Sanders supplied the name "Slick" to the Lansing Police, a suspect named James E. "Slick" Watts was apprehended and photographed. (Br. 8.)

The photograph from the Lansing Police file (A. 335) is obviously *not* a police photograph. (A. 275.)

The police mug shots of "Slick" Watts from the Chicago Police and the House of Correction were obtained by present counsel *after* the trial, and were introduced at the post-conviction hearing. (A. 276, 277.)

"Slick" Watts had never been arrested by the Lansing Police. Chief Braschler testified that the nickname "Slick" was supplied by Virgle Sanders; that he then "assigned Lt. Turbin to look for "Slick" Watts. We had "Slick" Watts' *name* during all this time." (A. 346, emphasis supplied.)

Mr. Justice Schaefer said in his dissenting opinion, App. 16a-17a:

> The defendant's conviction rests entirely upon identification testimony. The facts developed at the post-conviction hearing seriously impeached, if indeed they did not destroy, Sanders' trial testimony. Had those facts, and the identifications of "Slick" Watts by Thompson and Jones, been available at the trial, the jury may well have been unwilling to act upon the identifications of Patricia Hill and Henley Powell. Far more is involved in this case, in my opinion, than "the following up of useless leads and discussions

with immaterial witnesses." Certainly if Sanders' identification was material, the F.B.I. report and the testimony of the other witnesses which destroyed that identification were also material. Consequently, I believe that the State's nondisclosure denied the defendant the fundamental fairness guaranteed by the constitution. *Brady* v. *Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194; see *United States* v. *Wilkins* (2d Cir. 1964), 326 F. 2d 135.

2. THE SIXTEEN GAUGE SHOTGUN.

The Attorney General of Illinois offers three erroneous arguments in support of the introduction of a .16 gauge shotgun in a case in which the deceased was shot to death with a .12 gauge shotgun.

First, the respondent argues that the .16 gauge shotgun was found in the possession or control of the petitioner. (Br. 18)

The record refutes that conclusion. It did not belong to the petitioner and was never in his possession or control. It was recovered from a 1957 Ford (A. 58, 66-71) owned by a man named Barbee. (A. 68) The sawed-off barrel was recovered from Barbee's home. (A. 77) Mr. Justice Schaefer's conclusion that the .16 gauge shotgun was never in the possession or control of the petitioner (App. 14a) is the correct interpretation of the record.

Second, the respondent argues (Br. 20) as the majority held (App. 4a) that the .16 gauge shotgun was suitable for the commission of the murder of a man who was shot to death with a .12 gauge shotgun. That conclusion is simply wrong, as Mr. Justice Schaefer pointed out. (App. 14a) A twelve-gauge shotgun is larger than a sixteen-gauge shotgun. (A. 80) And that is *not* a legal argument. It is

based upon the immutable physical laws of the universe and the exact science of measurements. You can't get a twelve-gauge shell into the chamber of a sixteen-gauge shotgun.

Third, the respondent argues that since there was no conclusive proof what gauge shotgun was used to execute the deceased (Br. 19), there is a possibility that the .16 gauge shotgun could have been the murder weapon. (Br. 21, 22) That argument goes beyond the majority opinion which held that there was no clear evidence of the weapon *actually used* in this homicide. (App. 4a) The majority's observation is immaterial. The respondent's argument is desperate. The record shows that the prosecutor who tried the case filed a bill of particulars in which he stated that the murder weapon was a twelve (12) gauge shotgun. (A. 2) He stipulated that if Sergeant F. Benz of the Chicago Scientific Crime Detection Laboratory were called to testify, he would state his opinion that the shotgun shell waddings that had been removed from the chest of the deceased came from a .12 gauge shotgun. (A. 139) The prosecutor admitted to the trial judge that the .16 gauge sawed-off shotgun was not the weapon that killed the deceased (A. 138) and also admitted that to the jury. (A. 200, 202, 204-205)

The respondent's present argument questions the integrity and expertise of the police scientist, the theory of the prosecution, and seeks affirmance on an entirely different approach totally unsupported by anything in the record.

A .16 gauge shotgun did *not* kill the deceased. It is also clear in the record that the prosecutor used the .16 gauge shotgun to denounce the petitioner as a bad man generally. (A. 199-201, 204-206)

Since the .16 gauge shotgun was in no way connected with the offense or the accused, it cannot even qualify as propensity evidence. *Spencer* v. *Texas,* 385 U.S. 554, 572-575, dissenting opinion, and cases cited therein. The respondent recognizes the continued vitality of that principle of law. (Br. 21) Thus, the instant case is *a fortiori.*

3. JURY SELECTED IN VIOLATION OF WITHERSPOON.

Point A of the Attorney General's brief is raised for the first time in the case at bar. However, the same argument, almost word for word, was made in the Illinois Attorney General's petition for rehearing in *Speck* v. *Illinois,* ..... U.S. ....., ... L. Ed. 2d ....., which this Court denied on ....., 1971.

Surely once is enough to apply artificial respiration to theories that became terminal in *Witherspoon* itself.

Point B of the respondent's brief is devoted to an analysis of the questioning of two prospective jurors other than the eight who were removed in violation of *Witherspoon* standards.

The State attempts to create the illusion of compliance with *Witherspoon* by ignoring the eight prospective jurors who were removed in violation of *Witherspoon.* The questioning of two of the many prospective jurors, Conners and Nakata, presented in the State's brief (Br. 35) is hardly typical. The prospective jurors excused on the scruples questions were:

Louis Lorens (R. 152)

"I do not believe in capital punishment"

The Court: "Well, step down."

Katherine Kristoch (R. 212)

"I do not believe in capital punishment"

The Court: "Step down, please."

Marian Peterson (R. 250)

"Yes, I have a very strong conviction against capital punishment."

The Court: "Step down, please."

Nebraska Petty (R. 252)

"I do." (scruples question)

The Court: "Step down."

Jacqueline Threatt (R. 209)

"I feel very strongly against capital punishment."

The Court: "Step down, please."

Mary Gorski (R. 252)

"Yes, I do, your Honor." (scruples question)

The Court: "All right, step down."

Anna Hohnwald (R. 366)

"Yes, I do." (scruples question)

The Court: "Step down, please."

Esther Byrne (R. 122)

"I do not believe in capital punishment . . . No, I don't definitely not."

The Court: "Very well, that's your prerogative. You're excused for cause."

Moreover, the Illinois Supreme Court in affirming relied upon its own decision in *People* v. *Speck*, 41 Ill. 2d 177. The Illinois Court specifically stated: "In . . . Speck . . . we held that the exclusion of jurors with scruples against the death penalty did not necessarily void the infliction of the death

penalty." Your Honors vacated the Speck death penalty. *Speck* v. *Illinois*, ... U.S. ....., 29 L. Ed. 2d 855, 856.

There is a suggestion in Footnote 24, (S.B. 34) that the prosecution had saved enough peremptory challenges to eliminate the eight prospective jurors. This Court also rejected this same argument in *Speck* v. *Illinois*. Furthermore, the record reveals that the prosecution had only four challenges remaining (R. 146, 162, 242, 242, 242, 269, 277, 281, 303, 322, 322, 329, 329, 342, 346, 350—16 peremptory challenges used out of a total of 20.) How the prosecution could peremptorily challenge 8 jurors with only 4 challenges is an unexplained mystery.

CONCLUSION.

Petitioner prays that the judgment of the court below be reversed.

Respectfully submitted,

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